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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN CARLSON, Defendant and Appellant.	A144048 (Alameda County Super. Ct. No. 170014)

In April 1984, Tina Faelz, a 14-year-old high school student, was found dead on a path that connected her school to a nearby residential area. She had suffered 44 stab wounds, and the killing remained an open cold case for the better part of three decades. In 2011, DNA testing revealed the presence of defendant Steven Carlson's blood on Faelz's purse, which had been found in a nearby tree at the time of the crime. Defendant, 16 years old at the time of the killing, attended the same high school as Faelz.

In addition to the DNA evidence, the prosecution introduced statements defendant made during law enforcement interviews. In a 1986 interview, two years after the crime, an investigating detective asked defendant about a rumor he had heard that defendant had admitted the killing. Defendant acknowledged he had done so, but said he had been intoxicated and was joking. In a 2011 interview, after the DNA results revitalized the investigation and at which time defendant was in jail for other crimes, the investigating detectives initially represented they wanted to talk to defendant about the perils of habitual drug use. When the detectives revealed they were reinvestigating the Faelz

killing, defendant appeared to cough or catch his breath and arguably changed his demeanor. The prosecutor argued this reflected a "guilty conscience."

Defendant was convicted of first degree murder (Pen. Code, § 187(a)) and found to have personally used a dangerous weapon and to have inflicted great bodily injury (Pen. Code, §§ 12022, subd. (b)(1), 1203.075). He was sentenced to 26 years to life in state prison.

Defendant challenges his conviction on a number of grounds. We reject all of his contentions, except his assertion the evidence is insufficient to support first, rather than second, degree murder. We therefore order his conviction reduced to second degree murder and remand for resentencing.

DISCUSSION

Refusal to Allow 1984 Interview Statements into Evidence Under Evidence Code Section 1202

Before trial, the prosecution and defense filed competing in limine motions concerning the admission into evidence of defendant's statements to the police. The prosecution sought to introduce statements defendant made in 1986 wherein he "admitted to 'joking' that he killed Tina Faelz," which the prosecution described as an admission of guilt that he killed her. Defendant sought to exclude his 1986 statements, or, if they were admitted, to introduce statements he made in 1984, when officers initially investigated the crime, wherein he denied killing Faelz and, according to defendant, provided a detailed alibi timeline. The trial court granted the prosecution's motion and denied defendant's motion. Defendant maintains on appeal, as he did in the trial court, that under Evidence Code section 1202, he was entitled to "impeach" the credibility of his 1986 statements with his "inconsistent" 1984 statements.

Evidence Code section 1202 "governs the impeachment of hearsay statements by a declarant who does not testify at trial." (*People v. Blacksher* (2011) 52 Cal.4th 769, 806 (*Blacksher*).) That section makes admissible a declarant's statement "inconsistent with a statement by such declarant received in evidence as hearsay evidence" if proffered "for the purpose of attacking the credibility of the declarant." (Evid. Code, § 1202.)

"The theory of relevance for impeaching a witness or declarant with an inconsistent statement is that the hearsay and the inconsistent statement cannot both be true, that one must be wrong, and that, therefore, the person has 'some undefined capacity to err; it may be a moral disposition to lie, it may be partisan bias, it may be faulty observation, it may be defective recollection, or any other quality.' " (*People v. Baldwin* (2010) 189 Cal.App.4th 991, 1004 (*Baldwin*), italics omitted, overruled on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919, quoting 3A Wigmore, Evidence (Chadbourn ed. 1970) § 1017, p. 993; see *People v. Osorio* (2008) 165 Cal.App.4th 603, 615 [proper to admit inconsistent statement by victim that attacker was "tan" after admission of victim's spontaneous statement that attacker was " 'white' "].)

This logic applies "when a criminal defendant seeks to cast doubt on his own credibility as a declarant with regard to party admissions introduced against him by the prosecution. That is, from the inconsistency, the jury is permitted to draw the inference that the party admissions used by the prosecution cannot be trusted to be true, either because the defendant has 'a moral disposition to lie' or because the defendant has some other quality casting doubt on his accuracy in recounting the subject of the admissions and the inconsistent statement." (*Baldwin, supra,* 189 Cal.App.4th. at p. 1005.)

Admission of a declarant's prior inconsistent statement under Evidence Code section 1202 is, however, for a limited purpose—for impeachment only and not for the truth of the matter. (*Blacksher, supra,* 52 Cal.4th at p. 806; Simons, Cal. Evidence Manual (2017) § 2:18, p. 91.) "If the declarant is not a witness and is not subject to cross-examination upon the subject matter of his statements, there is no sufficient guarantee of the trustworthiness of the statements he has made out of court to warrant their reception as substantive evidence. . . ." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (2015 ed.) foll. § 1202, pp. 59–60.)

Pursuant to the court's in limine rulings, two detectives, one of whom was involved in the initial investigation of the crime, testified about the interviews they conducted in 1986 after hearing "rumors" that defendant "had admitted on a couple of occasions that he had killed Tina Faelz."

Detective Tollefson testified "we came right out and told [defendant] the rumors were that he admitted to killing Tina Faelz." According to Tollefson, defendant "was rather lighthearted about it . . .[he] said that but he was just joking." Defendant claimed he had been with two friends and "the three were intoxicated and began joking that they killed Tina because she wouldn't do their homework." Defendant, however, denied killing Faelz. He told Detective Tollefson on the day of the murder he had been "driving his mom's car" and "riding on Todd Smith's moped," and had seen Faelz "coming through the fence at some point in the field" while he was driving. Tollefson further testified that in a separate interview, a supposed friend of defendant's also "admitted to participating in that conversation with [defendant] . . . [¶] . . . [¶] [a]bout joking about killing Tina."

Detective Fracolli, who had been part of the initial investigation in 1984, similarly testified that he told defendant he had heard rumors defendant had admitted killing Faelz. According to Fracolli, defendant admitted he had said that he had killed her, but that was when he was drinking and doing drugs, and he had only been joking. Fracolli also testified defendant also told the detectives he did not kill Faelz. Defendant said he "couldn't remember everything clearly" about the day of the murder, and he "had been involved in using drugs for quite a few years." He said he had been driving his mother's car on the day of the murder and Todd Smith was in the car. He also said he had been riding a moped, and had watched the police from the roof of his home. Fracolli described defendant's demeanor as "a little anxious but cooperative" and stated defendant was not arrested in 1986 because the detectives "didn't have probable cause to show that he was, in fact, responsible for the crime."[1]

On appeal, defendant continues to maintain, as he did in the trial court, that in 1986 he admitted only that he "joked" about killing Faelz and this was not, contrary to the prosecution's characterization, an admission "of guilt" that he killed her. However, given that the prosecution continually portrayed his 1986 statements as such an

[1] The detectives' written report, prepared after the 1986 interviews, was not admitted into evidence.

admission, defendant maintains that his 1984 statements—that he did not kill her and providing a detailed alibi timeline as to where he was and what he was doing on the day of the killing—constituted "inconsistent" statements admissible under Evidence Code section 1202 to impeach the credibility of his supposed 1986 admission of guilt and assertion he could not remember much about the day of the killing.

We need not, and do not decide, whether the trial court erred in precluding defendant from introducing his 1984 statements under Evidence Code section 1202 to impeach his veracity in making the claimed admission of guilt in 1986. Even if the court erred, which appears likely, we conclude such error was not prejudicial.

We start with defendant's offer of proof. In his written in limine motion, defendant asserted his 1984 statements provided a "detailed description of where he was at each moment of the day" on the day of the murder. Defendant represented "there are at least 9 pages of reports reciting the details of [his 1984] statement—where he was, what he was doing, what streets he was driving on, etc."[2] At the hearing on his motion, defense counsel expounded that "in 1984 . . . he had a detailed timeline—and it's the same officer, not some consumption of time or something. . . . [Defendant] had a detailed description of where he was at each moment of the day, and that he did this first and he did that second and happened to—you know, failed to mention that he killed Tina Faelz, meaning that he—he didn't say that. It was a full denial, but it was more than that. It wasn't just this blanket, I didn't kill her. No. It was specific facts. . . ."

Turning to the evidence adduced at trial, the two detectives who initially interviewed defendant in 1984 provided some testimony pertaining to his initial statements. On questioning by the defense (without objection by the prosecution), Detective Fracolli, who participated in both the 1984 and 1986 interviews, testified that his 1984 report indicated that he "took [defendant] and [Todd] Smith back through the afternoon's routes . . . [a]nd timed them." While defendant had appeared anxious, he had been cooperative. Detective Fracolli also noted in his 1984 report that he had not

[2] Defendant was not asking, however, that these reports, themselves, be admitted into evidence.

observed any cuts on defendant. Detective Saulsbury, who was with Fracolli at the time, also testified the officers had done some "driving with [defendant] on April 11th [1984]." The two boys were "in our detective car and we—from the high school, we went to . . . the location about where his and this friend of his residence is." Saulsbury also did not recall there being any cuts on defendant's hands or anything unusual about his demeanor, and would have noted it in the 1984 report if he had. Although the detectives did not specifically testify that defendant made a "full denial" during the 1984 interview, the clear import of their testimony was that defendant did not admit to any involvement in the killing and provided the officers with an alibi.

Thus, when the totality of the testimony by Detectives Fracolli, Saulsbury and Tollefson is considered, it becomes apparent much of the evidence identified by defendant in his offer of proof came into evidence (and for all purposes, including the truth of the matter). The jury learned defendant was interviewed in 1984, he did not admit to the killing, he did not act suspiciously, he claimed he had been driving his mother's car and was with a friend, he claimed to have been riding a moped during part of the day, and he had been driven around in 1984, along with the friend, by the detectives on the routes defendant apparently claimed to have traversed. Had the trial court granted defendant's in limine motion, the evidence of his 1984 statements would have been admitted solely to impeach his veracity in making the 1986 statements, and not for the truth of the matter. (*Blacksher, supra,* 52 Cal.4th at p. 806.)

In addition, there was substantial evidence, albeit circumstantial, that defendant participated in the killing. This included defendant's DNA on the victim's purse (which had been found in a tree nearby and was presumably thrown there), his " 'God knows' " response to a teacher who asked if he was involved in the killing, his proximity to the murder scene and opportunity to commit the crime, his statement to Detective Tollefson that he saw Faelz on the day of the murder while he was driving around, his admission that he told other people he had "joked" about killing Faelz, and the change in his demeanor during the 2011 jailhouse interview after the detectives told him they were

there to question him about the killing given that DNA testing had revealed that his blood was on the purse.

Finally, defense counsel pointed to the 1984 interview in both opening statement and closing argument as showing that defendant had denied any part in the killing, had fully cooperated with the police, had explained where he was on the day of the killing, and that the detectives had discerned no basis to suspect defendant of the crime. Despite "all these interviews," said defense counsel in opening statement, there was "nothing happening." "[T]here is no suspect. It is an unsolved murder." And, in closing argument, counsel asserted "you can bet that if there was anything incriminating, that would have been utilized."

We therefore conclude any error in excluding defendant's 1984 statements as impeachment under Evidence Code section 1202 was harmless even under the *Chapman* beyond a reasonable doubt standard (*Chapman v. California* (1967) 386 US. 18, 24), as well as under the *Watson* not reasonably probable defendant would have received a more favorable verdict had the trial court allowed the excluded material standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see generally *People v. Fiore* (2014) 227 Cal.App.4th 1362, 1384; *People v. Leonard* (2014) 228 Cal.App.4th 465, 496.)[3]

Admission of the 2011 Jailhouse Interview

In 2011, after DNA testing revealed defendant's blood was on Faelz's purse, Detectives Batt and Knox visited defendant at the Santa Cruz County Jail where he was incarcerated for other crimes. The trial court allowed an edited video of this interview into evidence and provided the jury with a redacted transcript.

The prosecution sought admission of the interview on the ground it showed defendant harbored a guilty conscience. The prosecution pointed to defendant's supposed physiological response when the detectives finally disclosed the real reason for

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[3] Defendant also asserts the 1984 " 'timeline' " evidence was admissible to " 'impeach[] the prosecutor's desired inference that in 1986, [defendant] lied by stating his memories of the day were vague due to drug use.' " Even assuming it was error under Evidence Code section 1202 to deny him the opportunity to impeach inferences, any error was, for the reasons already discussed, harmless.

their visit (to re-question defendant about the killing), defendant's arguable change in demeanor during the remainder of the interview, and defendant's lack of memory about the killing in contrast to his memory about his drug use during the same time frame, which he had just discussed with the detectives. In addition, the prosecution pointed to defendant's claim during the interview that he could manipulate people and his comment methamphetamines could "numb" a person even in the face of the death of one's own child. Defendant strenuously objected to admission of the interview.

The trial court viewed defendant's change during the interview as "night and day" and allowed the taped interview after making numerous redactions of portions deemed offensive or prejudicial. It also instructed the jury that evidence of drug use is not evidence of bad character or criminal propensity.

Defendant claims the statements he made during the interview were involuntary given the detectives' initial deception as to their purpose in talking with him, and that the prejudicial impact of the interview far outweighed any probative value it had.

Voluntariness

During the interview, defendant wears a jailhouse orange jumpsuit. The detectives introduce themselves by name and title, but do not disclose the law enforcement agency for which they work.

In the unedited version, which we examine in connection with defendant's voluntariness claim, defendant recounts how he's got "22 years in the system doin' what we're doin' right now . . . [s]o I don't trip" and how the Sacramento police were "freakin' out" saying " 'Put your hands against the wall.' "

The detectives say "[w]e're just here to talk." Defendant says "[o]h, yeah," and asks if he's under arrest; the detectives say no. Defendant then asks if he is "in trouble." Detective Knox says, "No. We just wanna talk to you."

Small talk ensues. Defendant starts to talk about his methamphetamine use, but the conversation veers back to the topic of defendant's confinement at the jail. At this point, the detectives tell defendant that even though they are not "placing [him] under arrest" and even though it's "kind of silly," defendant is still in custody at the jail, and

"that's just how it goes," so the detectives have to read defendant his *Miranda*[4] rights. The detectives do so, and defendant acknowledges those rights. When defendant is told he has a right to a lawyer, he asks if he needs one. The detectives tell him that's for him to decide, but he has the right. In the unedited version, defendant mentions he's heard the warnings "thousands of millions of times."

After the *Miranda* admonishments, the conversation returns to what jail life entails and then Detective Knox, saying he was an "old dope cop," steers the conversation towards defendant's history of drug use and knowledge of the drug scene. Defendant opens up and talks about his struggle with methamphetamines, his harrowing exposures to heroin, and how he wanted to come to jail to escape.

Defendant is chatty, although his language is coarse and liberally dosed with profanity. He talks about helping the cops and how he's tired of being dirty.

After a few more minutes, defendant asks if this is all the detectives want to discuss. The detectives say "[t]his and some other questions" and that they want to get more background from defendant. Defendant then recounts an unpleasant attempt at using "oxy," his being homeless and how meth "numbs everything," how "[y]our kid could die in front of you" and after meth you say "[o]h, uh, well, clean it up," how easy it was to get meth, how he once wore a wire to rat out a rat, how he started using marijuana at age 14 and meth at 16, how his parents did not know how to deal with his drug use, and how he has learned to "manipulate people" to get what he needed while in "the system." Defendant continues to be talkative and his responses are rambling.

Eventually, Detective Batt tells defendant their conversation is "all good," but "we did come here with a purpose." Detective Batt finally discloses they are from Alameda County and investigating the Faelz killing.

At this point, about 21 minutes and 40 seconds into the video, defendant appears to cough and spit something into a wastebasket. This action is momentary.

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

The detectives ask defendant what he remembers, and he says he doesn't know how much he remembers and mentions his use of psych drugs. Defendant expresses surprise the detectives are there to discuss this "cold case."

The detectives ask defendant much more specific questions than they asked during the first part of the interview, and they press him to focus on the questions. His answers become shorter and less rambling, and his demeanor is more subdued. Defendant recalls Faelz's body was found near his home, but claims no memory of the day of her death. After a few more minutes, defendant invokes his right to a lawyer and the interview ends (this part is not shown to the jury).

Defendant claims he relied on the detectives' assurances about wanting to talk about drugs and about his not being in trouble, and these asserted misrepresentations coerced him into a conversation to which he would not otherwise have agreed.

Voluntariness, however, "cannot be taken literally to mean a 'knowing' choice. 'Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.' It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.' " (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 224.)

Voluntariness does not hinge on a suspect having "all information 'useful' in making his decision or all information that 'might . . . affec[t] his decision to confess.' " (*Colorado v. Spring* (1987) 479 U.S. 564, 576.) The Constitution does not " 'require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.' " (*Id.* at pp. 576–577.) Additional information might convince a subject to remain silent, but withholding that

information does not coerce the subject. (*Id.* at p. 577; accord *People v. Suff* (2014) 58 Cal.4th 1013, 1070.)

A statement is involuntary when, given all the circumstances, it is extracted by threats or obtained by direct or implied promises. (*People v. Neal* (2003) 31 Cal.4th 63, 79.)

While affirmative misrepresentations can render a defendant's statement involuntary (see *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1234–1235), our Supreme Court holds " '[t]he use of deceptive statements during an interrogation . . . does not invalidate a confession [as involuntary, unknowing, or unintelligent] unless the deception is " ' "of a type reasonably likely to procure an untrue statement." ' " ' " (*People v. Tate* (2010) 49 Cal.4th 635, 684 (*Tate*); see *People v. McCurdy* (2014) 59 Cal.4th 1063, 1088 [lulling suspect into thinking officers are there to " 'help' " and not to give " 'grief or punishment' " not coercive]; *People v. Smith* (2007) 40 Cal.4th 483, 505 ["Police deception 'does not necessarily invalidate an incriminating statement.' "]; *People v. Jones* (1988) 17 Cal.4th 279, 297–298 [psychological ploys prohibited as coercive only if " 'they tend to produce a statement that is both involuntary and unreliable' "].)

We review a trial court's determination of voluntariness independently, in light of the whole record and accounting for the characteristics of the accused and the details of the encounter, but we defer to the trial court's fact findings if supported by substantial evidence. (*People v. Jablonski* (2006) 37 Cal.4th 774, 813–814.)

Here, it is clear the detectives established a rapport with defendant by chatting about drugs. That, however, did not affect voluntariness. (*People v. McCurdy*, *supra*, 59 Cal.4th at p. 1088 [lulling suspect into thinking officers are there to " 'help' " and not to give " ' or punishment' " not coercive].)

Their various statements that defendant was not in trouble and not under arrest were, at the time, true. In any case, there is no hint any deception caused defendant to make a *false* statement, and the controlling cases are clear about the need for likely falsity. (See, e.g., *Tate*, *supra*, 49 Cal.4th at p. 684.)

There was no threat here. There was no promise of leniency. (See, e.g., *U.S. v. Swint* (1994) 15 F.3d 286, 290 [confession involuntary when made after assurances no prosecution would result from informal proffer]; *U.S. v. Knowles* (E.D.Wis. 1998) 2 F.Supp.2d 1135, 1147 [repeated promise of no arrest from confession].) Saying a suspect is "not in trouble" is not a promise of leniency on any particular crime (accord *State v. Wood* (Me. 1995) 662 A.2d 908, 910–911; *U.S. v. Chee* (D.Utah, Aug. 15, 2006, No. 2:05 CR 773) 2006 WL 2355837, at p. *5), and it would have been beyond reason for defendant to think such a prediction, offered out of context at the outset of the interview, would absolve him from responsibility for a murder and allow him to discuss such a crime or confess to it without consequence.

Also, defendant was no novice in the criminal justice system and well understood the risks of conversing with police. (See *People v. DePriest* (2007) 42 Cal.4th 1, 35 ["Defendant's prior experience as a felony suspect . . . suggest he was not confused or intimidated by detectives, and that he willingly chose to unburden himself."].)

The cases defendant cites largely concern two scenarios not present here.

First, defendant cites cases involving deceit employed not to obtain incriminating statements from suspects, but to obtain consent to conduct warrantless searches under the Fourth Amendment. (See *United States v. Tweel* (5th Cir. 1977) 550 F.2d 297, 299–300, fn. 8 [agent assured target no criminal investigator was involved and did not inform target of Fifth Amendment right to not incriminate, and so microfilms obtained from target not provided with consent]; *Alexander v. United States* (5th Cir. 1988) 390 F.2d 101, 102–103, 110 [postal inspectors, in context of illegal arrest, used "disingenuous questioning to mislead Alexander and thus obtain the wallet" without his consent]; *U.S. v. Como* (2d Cir. 1965) 340 F.2d 891, 894 [no consent when defendant gave agents access to room under false pretenses].)

"Fifth Amendment waiver" of the right to remain silent "and Fourth Amendment consent-to-search inquiries . . . are not the same. One difference is that the involuntariness prong of a Miranda waiver requires 'coercive police activity [as] a necessary predicate,' . . . something generally not required in Fourth Amendment consent

cases." (*U.S. v. Montgomery* (6th Cir. 2010) 621 F.3d 568, 573, quoting *Colorado v. Connelly* (1986) 479 U.S. 157, 167 ["coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"]; see *People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 412, fn. 4 [different standards of voluntariness may apply to Fourth and Fifth Amendment cases].) As discussed, the extra, coercive element—threat or promise—was lacking here.

Second, defendant cites cases involving IRS agents, or other non-police government agents, affirmatively misrepresenting their investigations as civil, when they were actually criminal. (See *U.S. v. Peters* (7th Cir. 1998) 153 F.3d 445, 451 (*Peters*) [civil revenue agents, in violation of agency guidelines, represented they were only conducting a routine civil audit, but were actually investigating for criminal purposes]; *U.S. v. Tweel*, *supra*, 550 F.2d 297, 299, fn. 8 [agent assured target no criminal investigator was involved and did not inform target of Fifth Amendment right to remain silent]; *State v. Morton* (2008) 286 Kan. 632, 634–635, 653–654 [agent of state government services agency did not disclose criminal nature of investigation and did not give *Miranda* warnings].) These cases do not apply to police questioning, which obviously appears criminal in nature and as to which officers may employ some deception. (See *Peters*, at pp. 463–464 (conc. opn. of Easterbrook, J.) [questioning wisdom of the tax agent cases and noting contrary rules applicable to police]; *State v. Morton*, at p. 653 ["as a government agent for an agency with both civil and criminal investigative power, the criminal investigatory purpose of the agent's interview was not obvious in the way an interview conducted by police officers and detectives is"].)

In sum, the 2011 interview was not coercive and defendant's statements were not involuntary.

Relevance and Prejudice

Defendant additionally contends the 2011 interview had no relevance and, even if it had some marginal relevance, it was excessively prejudicial—given that he appeared for over 20 minutes in an orange jumpsuit, in custody, talking about his history with

criminal drug use, interactions with law enforcement, and his life hardships. Defendant claims the interview should have been excluded, at least, under Evidence Code section 350.

As we have discussed, the prosecution claimed the 2011 jailhouse interview was relevant because (1) it showed defendant's reaction, the apparent cough and spitting into a waste basket, on learning the detectives were there to re-interview him about the murder; (2) he stopped being chatty on learning the true purpose for the interview; (3) he claimed lack of memory of the time of the killing, despite the fact he had just recounted a fair amount of his life's history involving his drug use; and (4) he claimed to have started using methamphetamine the same year Faelz died and said the drug has a numbing effect, such that one could witness his child die and shrug it off. All of this, said the prosecution, reflected a guilty conscience.

Thus, during closing argument, the prosecutor told the jury to watch for a change in defendant's interview demeanor that signified guilt. She asked the jury to recall defendant was 16 at the time of the murder, and that while he appeared to have less recall of details when questioned about that day, he had talked at length about starting meth at 16, about dropping out of high school at 16, and leaving Pleasanton at 17. The prosecutor told jurors defendant's drug use did not make him a bad person or a murderer, but asked them to consider his description of methamphetamine as a numbing agent.

Defense counsel argued the man in the video was a recovering drug addict leveling with police about the ills of his pursuits. Counsel argued defendant's supposed physical reaction and change in demeanor were the natural responses of an innocent person on realizing the police had misled him and were re-questioning him about a murder they had questioned him about in 1984 and again in 1986, and as to which they had concluded there was no basis to charge him with any crime. Or, posited defense counsel, the momentary cough and spit could simply have been choking on coffee.

In *People v. Rogers* (2009) 46 Cal.4th 1136, 1161, a defendant " 'got real bug-eyed and got real nervous' and 'started pacing' " when asked who he would kill next. The emotional response was nonhearsay and relevant. (*Id.* at pp. 1161–1162.) In *People*

v. Snow (1987) 44 Cal.3d 216, 227–228, a defendant's passive nonresponse to news of a victim's death was admissible, and any "objection based on the ambiguous nature of defendant's response would be addressed to the weight of the evidence, and not its admissibility." Likewise, a death row inmate's attempted escape could be evidence he was avoiding trial on a second murder charge, not simply that he wanted to avoid his death sentence. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1126; accord *U.S. v. Roel* (5th Cir. 2006) 193 Fed. Appx. 309, 311–312 [defendant "initially seemed abnormally friendly, and then his demeanor changed noticeably upon the introduction of a drug-sniffing dog" such that a "reasonable jury did not have to regard such evidence as equivocal, and could have inferred . . . guilty knowledge"].)

On the other hand, courts must be wary of ambiguous reactions, which are not highly probative, and, standing alone, would be insufficient to prove guilt. The United States Supreme Court has "consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime," because the evidence is ambiguous and can suggest both consciousness of guilt and terror-stricken innocence. (*Wong Sun v. United States* (1963) 371 U.S. 471, 483–484, fn. 10 [in evaluating the probable cause for a search, suspect's "refusal to admit the officers and his flight down the hallway thus signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion"].) *Wong Sun*, in turn, cites *Cooper v. United States* (D.C. Cir. 1954) 218 F.2d 39, 40–41, in which the circuit court reversed a conviction based on a suspect telling his cousin to say she and he were out of town in a certain city on the day of the robbery. The cousin was not in that town, so the suspect was asking his cousin to lie, but there was no evidence defendant was not in that town. Thus, the suspect's request could be "explained by terrorized innocence as well as by a sense of guilt." (*Cooper*, at p. 41 ["After all, innocent people caught in a web of circumstances frequently become terror-stricken."]; see *Vidrine v. U.S.* (W.D.La. 2011) 846 F.Supp.2d 550, 578 ["a change in demeanor upon recognition of [a] miscommunication, during a high stress interrogation, would not be unexpected or clearly indicative of 'guilty knowledge' as the government argues"].)

Nonetheless, consciousness of guilt evidence remains relevant even if the conduct can be explained in another way. (See *People v. Hughes* (2002) 27 Cal.4th 287, 335.) Generally, it will be for "the jury to decide what to make of an ambiguous statement which might be an effort to conceal guilt or might be innocent. If the jury accept[s] defendant's explanation (via counsel) for the statement . . . admission of the statement could not have worked to defendant's prejudice." (*People v. White* (1995) 35 Cal.App.4th 758, 773.)

While we do not believe the probative value of the 2011 interview was high, it did reflect an arguable change in his demeanor on learning the detectives were reinvestigating the murder—both a physical response and a change from chatty and fairly freewheeling answers to more restrained responses. When the tape is viewed in toto, there are several possible explanations for defendant's demeanor, including defendant's nagging conscience, on the one hand, and innocent anxiety and the detectives' own change in the mode of their questioning, on the other.

As to prejudice, " '[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " ' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, italics omitted.)

It is true evidence of a defendant's criminal drug problems "is inadmissible where it 'tends only remotely or to an insignificant degree to prove a material fact in the case.' " (*People v. Cardenas* (1982) 31 Cal.3d 897, 906.) The impact of such evidence " 'upon a jury of laymen [is] catastrophic. . . . It cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem . . . and has been taught to loathe those who have anything to do with illegal narcotics in any form or to any extent.' " (*Id.*

at p. 907.) Thus, it was prejudicial in *Cardenas* for the jury to hear the defendant was under the influence of narcotics when arrested five days after an alleged robbery. The jury could not be allowed to speculate that the defendant's drug addiction drove him to steal. (*Id.* at pp. 902, 906–907; see *People v. Davis* (1965) 233 Cal.App.2d 156, 161–162 (*Davis*).) But when the link between a crime and a defendant's drug use is not so tenuous, evidence of drug use is admissible. (See *People v. Felix* (1994) 23 Cal.App.4th 1385, 1392–1394 (*Felix*) [defendant's own statement linked theft and drugs].)

The drug-use-as-motive cases, *Cardenas*, *Davis*, and *Felix*, arise from concern that every addict charged with robbery would face exposure of his or her drug habits and character flaws without a sufficient showing of relevance. (See *People v. Gonzales* (1990) 51 Cal.3d 1179, 1209, superseded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682, 690.) This concern is not applicable here, as there is no claimed connection between defendant's drug use at the time of the 1984 crime and the motive for the killing. Evidence of defendant's struggle with addiction was expressly *not* introduced for the purpose of showing his disposition. The trial court instructed the jury drug use was not evidence of bad character or criminal propensity, and we must presume the jury followed the instructions given it. (See *People v. Simon* (2016) 1 Cal.5th 98, 130.)

Moreover, defendant's recitation of his drug history was not completely irrelevant. The recitation pertained to whether he feigned memory loss about the day of the killing, whether he had a "guilty" reaction to news of the renewed investigation, and whether he commenced using methamphetamine because he harbored a guilty conscious that required numbing.

Ultimately, while the edited video does not portray defendant in a flattering light, it does not inflame the passions. And while we cannot say the trial court reached the only permissible result in allowing the edited video, neither can we conclude admitting it was an abuse of discretion. In the end, the prosecution and defense each argued their own view as to the import of the video, with proper limiting instructions by the court.

Prosecutorial Misconduct

Defendant next contends the prosecution's closing argument was rife with objectionable argument that rose to the level of prosecutorial misconduct. We examine each alleged instance of misconduct.

No other suspect

Defendant maintains the prosecutor's assertions "there is no evidence of any other suspect" or "there is no unknown suspect" were improper.

The first remark was part of the prosecutor's assertion there were "over 40 pieces of crime scene evidence . . . examined, and there is no evidence of any other suspect."

The second remark—that there was no unknown suspect—immediately followed the prosecutor's summary of the scientific evidence. The prosecutor pointed out Faelz's fingerprints on her personal belongings, her blood on various books, and a hair that was likely Faelz's. Faelz's DNA was the only DNA found under her fingernails, and a dry material in Faelz's abdomen contained only Faelz's DNA. Finally, tests for seminal fluid on Faelz's body and clothes were negative.

In context, the prosecutor's argument reasonably reflects the state of the evidence—that after scientific evaluation of the crime scene evidence for identifying information, defendant was the only suspect identified. Nor did the prosecutor ever represent that the police investigation was flawless or vouch for it. Rather, her argument was a valid comment on the state of the evidence. (See *People v. Dennis* (1998) 17 Cal.4th 468, 522 [must take prosecution's arguments in context, and absent deceptive or reprehensible methods of persuasion, no misconduct].)

The prosecutor did not improperly place on defendant the burden of proving some other suspect existed and committed the crime, or undermine defendant's choice to remain silent at trial. (See *Griffin v. California* (1965) 380 U.S. 609 [prosecutor may not comment on defendant's choice to invoke right to not testify].) Essentially, the prosecutor argued that after testing of the available crime scene evidence, there was no evidence of other leads. This was a fair characterization. (See *People v. Morris* (1988) 46 Cal.3d 1, 36 ["The deputy district attorney's comment that there was 'not a shred of evidence to suggest that anybody else did the killing' clearly referred to the state of the

evidence. It contained no reference—express or implied—to defendant's silence, and therefore was not objectionable."], disapproved of on other grounds by *In re Sassounian* (1995) 9 Cal.4th 535, 544–545, fns. 5–6; *People v. Brown* (2003) 31 Cal.4th 518, 554 [despite *Griffin*, "[a] prosecutor is permitted . . . to comment on a defendant's failure to introduce material evidence or call logical witnesses"]; *People v. Ratliff* (1986) 41 Cal.3d 675, 691 [no error in prosecutor's remark that "[a]bsolutely zero [evidence] has been presented to you by Mr. Ratliff and his attorney"]; see also *People v. Lewis* (2004) 117 Cal.App.4th 246, 257 [right to remain silent a shield, not a sword to cut off prosecution argument fairly commenting on evidence].)

People v. Woods (2006) 146 Cal.App.4th 106, 112–113, which defendant cites, confirms "[c]omments on the state of the evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permissible." In that case, the prosecution argued the defendant was "obligated" to put on evidence of a police officer's misconduct if the jury was to discredit that officer's testimony and concluded, " 'in this day and age, you'd have heard about it' " from the witness stand if there had been any such misconduct—you didn't hear it, " '[b]ecause it doesn't exist.' " (*Id.* at p. 112.) The prosecutor's argument in this case makes no suggestion of an added defense obligation. Additionally, the court in *Woods* feared the prosecutor's argument required the jury to reach a false conclusion. If, as the prosecution argued, evidence of misconduct was readily available (a falsity; it was confidential), and if, as the prosecution further argued, none existed, the jury could only conclude counsel had checked the records, had actual knowledge of no misconduct, and was vouching as to this extra-record evidence. (*Id.* at pp. 112–113.) There is no such problem in this case. Nothing in the prosecutor's argument asked the jury to rely on undisclosed investigative efforts or test results.

In a similar vein to the "no other suspect" remarks, the prosecutor also argued to the jury "the DNA . . . tells you no one else on earth left their DNA at that crime scene." Defendant made no objection to this assertion at trial, and has therefore forfeited his misconduct argument related to it. (*People v. Panah* (2005) 35 Cal.4th 395, 462.) In any

event, the statement does not, as defendant puts it, improperly make claims about "when" DNA got on Faelz's purse. "[P]rosecutors have wide latitude to discuss and draw inferences from the evidence presented at trial. ' "Whether the inferences the prosecutor draws are reasonable is for the jury to decide." ' " (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) The prosecution here was allowed to ask the jury to infer that defendant's blood got on the purse during the fateful attack, as there was no evidence identifying anyone else at the scene other than defendant and Faelz.

Other "Zero Evidence" Claims

The prosecutor also argued in closing there was "zero evidence" of an innocent DNA transfer and "no evidence of anyone else joking" about killing Faelz. Defendant again argues these remarks saddled him with a greater burden of proof and commented upon his decision not to testify. Again, we reject these arguments, as saying there is zero or no evidence is, in most cases, a comment on the state of the evidence as a whole, does not create new burdens for defendant, and does not undermine defendant's right to remain silent at trial. (*People v. Morris*, *supra*, 46 Cal.3d at p. 36; *People v. Ratliff*, *supra*, 41 Cal.3d at p. 691; *People v. Lewis*, *supra*, 117 Cal.App.4th at p. 257.)

We agree with defendant, however, that the prosecutor made a misrepresentation when she said there was "no evidence of anyone else joking." In fact, Detective Tollefson testified there were three youths who "were intoxicated and began joking that they killed [Faelz] because she wouldn't do their homework." The officer said "several of them joked about it" and that "he [defendant] and other people had joked about it." Misstating or misrepresenting the evidence is misconduct. (*People v. Davis* (2005) 36 Cal.4th 510, 550 [misconduct for prosecutor to argue in closing that two people were " 'only ones' " admitting to being present at crime scene when this was not the testimony].)

However, defendant has forfeited this claim of misconduct. He only objected generally, and on the ground of "burden shift." He did not raise the factual error, but easily could have. General objections are insufficient and forfeiture results when the defendant fails "to articulate any specific grounds for the objection or to request any

corrective instructions." (*People v. Sanders* (1995) 11 Cal.4th 475, 549; *People v. Hill* (1998) 17 Cal.4th 800, 820, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) "Review on appeal is . . . barred unless an admonition would not have cured the harm . . . . Here, any harm could have been cured by an instruction to disregard the prosecutor's comment in view of the lack of evidence. Accordingly, defendant has forfeited this claim on appeal." (*People v. Davis*, *supra*, 36 Cal.4th at pp. 550–551.) In addition, the trial court instructed the jury that the attorneys' remarks were not evidence. "We assume the jury followed these instructions, and that any prejudice . . . was thus avoided." (*People v. Chatman* (2006) 38 Cal.4th 344, 405.)

Further, in context, this single misstatement was not prejudicial.

Knife Slipping

The prosecutor argued defendant's blood got on Faelz's purse because he cut himself on his own knife when it, because it lacked a hilt and became covered in blood, became slippery. She also argued that when the single-edged knife slipped, it turned and might have been the reason Faelz's wounds were at varying orientations (i.e., sometimes the sharp edge was facing right, sometimes the blunt edge was facing right).

Defendant claims the prosecutor's argument was speculative and unsupported by evidence. The murder weapon was never found, and the sole evidence of defendant's possession of a knife was when he was asked in 1986 whether he ever had a knife and he said he had a pocket knife in 1985, the year after the killing, but had given it away that year (there are no other details about that knife or how long defendant had it). The pathologist testified the wounds were made by a knife with a one-sided blade measuring 0.75 to one-inch wide and at least three and one-half to five inches long. The blade left no hilt marks. She was not asked whether it could have been a pocket knife.

"Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial." (*People v. Huggins* (2006) 38 Cal.4th 175, 207.) " ' " 'The argument may be vigorous as long as it

amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' " ' " (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.)

Given the evidence of multiple stab wounds—some hitting bone and creating resistance—and no hilt marks, it was not beyond the bounds of reason for the prosecutor to argue defendant was injured and bled because the murder weapon slipped in his hands.

Belief and No Doubt

Defendant also takes issue with how the prosecutor explained portions of the law. For instance, in rebuttal, the prosecutor acknowledged "the standard of proof beyond a reasonable doubt is absolutely my burden" and then stated: "Beyond a reasonable doubt is not a mysterious or mythic standard. It is the same standard that's used in courtrooms across America every single day. *And if you believe that the charges are true, you don't have a reasonable doubt*." (Italics added.) Defendant asserts the italicized statement misstates the law and was misconduct.

The prosecutor's equation of ordinary belief with beyond a reasonable doubt is inartful, if not troubling. The Supreme Court, however, has ruled in nearly an identical context that such a remark is neither misconduct nor prejudicial. (*People v. Cortez* (2016) 63 Cal.4th 101, 130 [The prosecutor defined reasonable doubt in closing argument as: " 'you look at the evidence and you say, "I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me." ' "].) As in *Cortez*, we have an isolated remark, proper instructions from the court on reasonable doubt, and defense counsel's own emphasis of the proper standard during closing argument. (*Id*. at pp. 130–131.) We accordingly find no prejudicial misconduct.

Don't Have to Prove How Defendant's DNA Got on Purse

The prosecutor also asserted no jury instruction required her to prove "how this DNA" of defendant "got on there," meaning the purse. Read in isolation, this statement is also troubling, as it suggests the People could make their first degree murder case

without proving defendant's DNA got on Faelz's purse during and as a result of committing the crime. This remark, however, must be viewed in context.

The prosecutor next stated she need not prove "that [defendant] cut his thumb or his pointer finger or his palm, that he cut himself on the first stab or the 13th or the 27th or the 44th. There's no requirement that I prove that he cut himself during the incident. He could have had blood on his hands beforehand and killed her and picked up the purse." In this way, the prosecutor was correct. As long as the jurors believed beyond a reasonable doubt that the evidence established defendant's blood made it onto Faelz's purse because he stabbed her to death, that was sufficient. Accordingly, in context, there was no prosecutorial misconduct.

Circumstantial Evidence

Also in rebuttal, the prosecutor discussed the role of circumstantial evidence, making statements we have labeled A, B, and C. She stated: "[A] There's been a lot of talk today of circumstantial evidence and the fact that when evidence leaves two reasonable interpretations, if one points to innocence and one points to guilt, then you have to adopt the one that points to innocence. That's what you're instructed to do and that's the law. [B] But you're also instructed to be reasonable, and when you have two interpretations of evidence, one that points to innocence and one that points to guilt, you have to adopt the interpretation that points to guilt if that's the reasonable one." Defense counsel immediately objected that the prosecutor misstated the law. The court stated: "The law is the law. You have the instructions. Overruled." The prosecutor continued: "[C] You have to be reasonable. So if there are two interpretations, you have to adopt—one is reasonable and one is unreasonable, you have to adopt the reasonable one."

Statements A and C were unquestionably accurate statements of the law. The prosecution must prove its case beyond a reasonable doubt, not beyond an unreasonable one, and a prosecutor can argue that the jury should accept a reasonable interpretation and reject an unreasonable one. (CALCRIM No. 224; *People v. Centeno* (2014) 60 Cal.4th 659, 672 (*Centeno*).) Taken as a whole, the prosecutor conveyed (1) a reasonable interpretation that points to innocence must be accepted, and (2) if the only

reasonable interpretation points to guilt, unreasonable interpretations that point to innocence must be rejected. Although statement B, taken alone, might have confused the jury, the prosecutor's argument, as a whole, conveyed the proper standard. In no way did the prosecutor, in discussing the handling of circumstantial evidence, leave "the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden." (*Id.* at p. 672.)

Degree of Murder

Having found no error that would require reversal of the murder conviction outright, we turn to defendant's assertion that there is insufficient evidence to support a conviction of first degree murder.

"The mental state required to support a finding of first degree premeditated murder is 'a deliberate and premeditated intent to kill with malice aforethought.' " (*People v. Clark* (2016) 63 Cal.4th 522, 624.)

"An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) In this context, " 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' " (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) "We normally consider three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing—but '[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.' " (*People v. Jennings* (2010) 50 Cal.4th 616, 645–646, quoting *Stitely*, at p. 543.)

"Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation that was previously set forth. Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to

determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.] The standard of review is the same in cases such as this where the People rely primarily on circumstantial evidence. [Citation.] 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

In arguing for a first degree murder conviction, the prosecutor focused solely on the number and nature of the stab wounds. She told the jury she did not need to prove motive—in fact, she said motive could not be proven.

Defendant contends the number and nature of the wounds, alone, does not establish that the killing was premeditated and deliberate, citing cases like *People v. Anderson* (1968) 70 Cal.2d 15, 24–25 (*Anderson*), wherein the Supreme Court stated, "It is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation. 'If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations.' " "[M]ultiple wounds" alone are insufficient, as "[a]bsent other evidence, a brutal manner of killing is as consistent with a sudden, random 'explosion' of violence as with calculated murder." (*People v. Alcala* (1984) 36 Cal.3d 604, 626, superseded by statute on another ground as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911; *People v. Turner* (1990) 50 Cal.3d 668, 688 fn. 4; *People v. Pantoja* (2004) 122 Cal.App.4th 1, 14 ["the sheer quantity of the wounds, . . . the existence of defensive wounds," and location of one wound on victim's back did not permit conclusion killing was premeditated].)

When there is only conjecture or surmise that defendant " 'carried out the intention to kill as the result of a concurrence of deliberation and premeditation,' " the verdict must be for second degree murder, not first. (*Anderson*, at p. 25.)

The cases the Attorney General cites on appeal—*People v. Elliot* (2005) 37 Cal.4th 453, 471, *People v. San Nicolas* (2004) 34 Cal.4th 614, 658–659, *People v. Pride* (1992) 3 Cal.4th 195, 247–248, or *People v. Hovey* (1988) 44 Cal.3d 543, 556—are not to the contrary and do not suggest that a multiple-wound killing, alone, is sufficient to establish first degree murder. Rather, each case involved a significant plus factor supporting premeditation and deliberation. (See *Elliot*, at pp. 457–459, 471[bartender responsible for closing bar was killed in storeroom where safe was kept; there was evidence money was missing, defendant had armed himself with knife, and he had surveyed bar before the attack and waited until all customers left]; *San Nicolas*, at p. 658 [evidence defendant killed victim because "she saw him in the bathroom covered in Mary's blood and carrying a knife as he attempted to clean up, and defendant saw in the bathroom mirror that [victim] had seen him at this critical juncture"]; *Pride*, at p. 247 [evidence of two possible motives including to "silence [victim] as a possible witness to her own sexual assault"; testimony supported inference defendant waited until victim was alone and then followed or forced her to secluded location in building]; *Hovey*, at p. 556 [evidence defendant tied and blindfolded victim and drove her to place he considered secluded and killed her when the blindfold slipped and he became worried the victim could identify him].)

The Attorney General maintains the following supply the plus factor and support a first degree conviction, (1) around noontime, just hours before the victim was found around 3:00 p.m., a teacher, who had been summoned by other students saying they heard beating from within a school dumpster, found defendant locked in a dumpster and characterized him, on emerging from the dumpster, as belligerent and appearing intoxicated; (2) the victim was found in what the Attorney General calls an obscure and hidden location; and (3) defendant's 1986 statement that he and his friends joked about

killing Faelz for refusing to do their homework, which the Attorney General maintains was not a joke, but an admission of a planned killing.

With respect to defendant being found in a school dumpster, there is no evidence as to why or how defendant ended up there and no evidence Faelz had anything to do with the incident or was anywhere near the scene. The evidence of any interaction between Faelz and defendant at all was scant. In the 1986 interview, defendant denied any social contact with her and said they might have passed in the school hallways. A friend of Faelz's said she had not seen any interaction between the two during high school and was aware of only one interaction in middle school. During that encounter, Faelz and another girl were with a group of boys that included defendant. Faelz asked defendant to stop harassing the girl, saying " 'why don't you leave her alone.' " The harassment wound down, and that was the whole of the encounter. None of this evidence establishes a motive for the killing or suggests premeditation.

As for the location where Faelz's body was found, the evidence does not support the Attorney General's characterization. Rather, the body was found along a well-used path from the high school to a neighborhood on the other side of a nearby freeway, just past that part of the path where it goes under the freeway. The location was visible from the freeway; in fact, Faelz's body was found following a report by a truck driver who thought he saw a body along the path. Defendant lived with his family in the first house along the path after it emerged from the freeway underpass. Thus, there is no evidence of a remote or secretive location to which defendant lured Faelz for a planned killing.

That leaves the evidence that in 1986 defendant said he and his friends had joked about killing Faelz because she refused to do their homework, which the prosecution maintained was not a joke but an admission defendant committed the murder. The evidence of joking is from Detective Tollefson's 1986 police report, to which Tollefson testified. During the interrogation, defendant was asked about a rumor (the source of which Tollefson did not disclose) that he had admitted killing Faelz. Defendant responded, "that he had said that but he was just joking." He explained he and two friends "were intoxicated and began joking that they killed [Faelz] because she wouldn't

do their homework." The detective interviewed one of the friends, who confirmed the intoxicated conversation occurred, but the record otherwise says nothing about what the friend actually said. Moreover, there is no evidence defendant and his friends had any homework at all, let alone that any of them approached Faelz to do it for them. In fact, as we have recited, the only evidence as to any interaction between defendant and Faelz was that there was none during high school other than "he may have said hi to her while passing in the halls."

"A first degree murder conviction premised upon premeditation and deliberation requires more than a showing of the intent to kill; it requires evidence from which reasonable jurors can infer that the killing is the result of the defendant's preexisting thought and reflection." (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1274.)

While there is some evidence to support inferences allowing a finding defendant killed Faelz—i.e., that Faelz died from stab wounds made by a knife, that defendant's blood was the only foreign blood found on her purse, and that defendant seemingly reacted and changed his demeanor during the 2011 jailhouse interview when the detectives finally revealed the real purpose of the interview—no substantial evidence supports the posited plus-factors the Attorney General claims makes the number and nature of the stab wounds further evidence of premeditation and deliberation.

In addition to the evidentiary shortcomings as to first degree murder, we are troubled by the prosecutor's argument on premeditation and deliberation. The prosecutor told the jurors that after they reached a verdict, they would be free to talk, and people would want to hear about the process—"what's it about, what's going on." "[Y]ou tell your friend, 'It was awful. He stabbed her a third time and a fourth time, a fifth time, a sixth time.' And your friend stops you and goes, 'Wait, wait, wait. I mean, nobody had any problem reaching the conclusion it was first degree murder, right?' " When defense counsel objected on the ground this argument asked the jurors to improperly consider public opinion, the trial court overruled it. The prosecutor continued: "how many times does he have to stab in order to make it a clearly premeditated and deliberate murder?"

In *People v. Shazier* (2014) 60 Cal.4th 109, 144–145, the Supreme Court addressed the problem of prosecutors asking jurors to imagine how the public would respond to their verdict. In that case, the prosecutor told the "jurors that, unless they avoided all conversation about the case, they would 'have to explain' to their family and friends how they had carried out their civic responsibility 'for the last two and a half or three weeks,' then argu[ed] at length that they would not be able to give a satisfactory explanation" if they failed to convict. (*Id.* at p. 145.) Said the high court, "the prosecutor's rhetorical use of a hypothetical conversation with nonjurors might be seen simply as an effort to convince the jurors they would have intellectual difficulty justifying or explaining a 'not true' verdict, because such a determination would be illogical and against the credible evidence. It could be argued that the 'conversation' metaphor simply served as a device to work through this reasoning, step by step, by knocking away, one by one, potential bases for finding that defendant was not an SVP [sexually violent predator]." (*Id.* at p. 144.) But, the court went on to say, the prosecutor "could easily and effectively have made similar points without such extensive and focused allusions to a circumstance the jurors were expressly instructed to disregard—the potential community reaction to their verdict. Because the specter of outside social pressure and community obloquy as improper influences on the jurors' fairness and objectivity is so significant, we cannot countenance argumentative insinuations that jurors may confront such difficulties if they make the wrong decision. [¶] . . . The import was clear, and it cannot be condoned. The prosecutor's argument was improper." (*Id.* at p. 145.) No reversal occurred because the court concluded the misconduct was not prejudicial. (*Id.* at p. 151.)

Here, the prosecutor essentially invited the jurors to consider what she apparently thought was a lay person's view of "first" degree murder—that it is simply a particularly brutal one. Her argument plainly played on societal pressure by asking jurors to fathom how they would explain to their acquaintances any result other than first degree murder, given the number of stab wounds. This entreaty also encouraged the jurors to disregard the law. As we have discussed, a brutal, multiple-wound attack may be "murder," but it

is not ipso facto first degree murder. First degree murder requires proof of premeditation and deliberation, which are well-defined legal concepts, and first degree murder cannot be predicated solely on the brutality of a killing or the number of stab wounds inflicted. Moreover, the danger the jurors might have been led astray on this point was significant because the jury was given the standard instruction on first degree murder, CALCRIM No. 521, which does not include an advisement that the mode of the killing, by itself and without more, is not sufficient evidence to establish premeditation and deliberation.

Since defendant has made no claim the evidence does not support a conviction of second degree murder, we reduce the conviction to second degree murder and remand for resentencing. (*People v. Steger* (1976) 16 Cal.3d 539, 553; *People v. Anderson*, *supra*, 70 Cal.2d at p. 23; see Pen. Code, § 1260 ["The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed . . . ."].)

DISPOSITION

We affirm defendant's conviction, but reduce his offense to second degree murder and remand for resentencing.

_____
Banke, J.

We concur:

_____
Humes, P.J.

_____
Dondero, J.

A144048, *People v. Carlson*